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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1911.

CHARLES R. HEIKE

Petitioner,

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Supplemental Brief for the Petitioner.

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IN THE

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CHARLES R. HEIKE,
Petitioner,

v.

UNITED STATES,
Respondent.

No. 936.

Supplemental Brief for the Petitioner.

(1) The Solicitor General inadvertently states an error of fact on page 3 of his brief. Heike does not claim immunity solely because of his testimony given in the "Kissel loan inquiry," but principally on account of testimony given and documents produced by him in subsequent inquests under the Sherman Anti-Trust Act pleaded in the plea at bar, to wit, 1 Record, fols. 114-123, and Exhibit C, fols. 137-141. This second inquiry has nothing to do with the "Kissel" case. It was at this second inquiry that Heike furnished the evidence of which the Court of Appeals found:

> "There was furnished to the second grand jury a statement giving actual meltings of each company operated by the American from 1887 to 1907, showing the pounds of sugar melted each year in each refinery, which included the amount melted by the Havemeyer & Elder Refinery for the period covered by Heike. On the trial of the indictment it was essential to show the true weights of certain importations, and in order to enable the jury to determine what they were, proof was made of the quantity actually melted at that refinery" (5 Record, fols. 4934-5).

This particular evidence seems to be ignored throughout the Government brief; but the Court of Appeals, assumed, especially on account of this particular evidence, that Heike's testimony was sufficiently connected with the subject matter of the indictment (Do., fols. 4934-5).

(2) We call attention to the fact that the main contention of the Government brief is based upon a reversal of the logic of the immunity statute. Thus, in the paragraph at the bottom of page 14 and at the top of page 15, and in the first paragraph of page 20, counsel makes the point that a lack of sufficient connection between Heike's testimony and the sugar weighing frauds is shown by the argument that evidence of the latter would not be "relevant" to prove a violation of the Anti-Trust Law. But that is not the point of the statute. An embezzlement or sugar weighing fraud discovered from books produced may not be relevant evidence of the commission of a crime under the Anti-Trust Act; but the immunity provision operates the other way around—that is, the statute provides that the witness shall be exempt from prosecution for anything he may discover

directly or indirectly, whether it be relevant to the proof of the monopoly or trust, or only incidentally disclosed by testimony or books.

The point and the distinction are explained in the minority opinion in *Brown* v. *Walker*, 161 U. S. 623, not controverted as to that question in the majority opinion. In fact, the point of sufficient connection or concern between the testimony and the crime indicted on which the Government bases its fourth and fifth points, was not raised by the Court of Appeals, but that Court assumed throughout that there was sufficient connection and its decision was based upon an entirely different point.

(3) We call attention to the divergent and contradictory positions heretofore taken by the Government as a strong argument for granting the writ. In the first place the District Attorney in the court below relied almost entirely upon the argument, that the immunity statute was merely a "substitute" for Amendment V of the Constitution—*i. e.*, a perfect equation—and therefore, was subject to the same conditions, the immunity must be pleaded as a privilege on the stand or else it will be deemed waived, etc. Secondly, the Court of Appeals completely ignored this argument, assumed that we were right in the contention that Heike's testimony did "concern" the subject matter of the indictment, and based its opinion mainly on a misconception of the doctrine of *Hinkel* v. *Hale*, *Wilson* and similar cases, to wit, that Heike being an officer of the Sugar Company, he could gain no immunity for testifying against the corporation, not even his own personal immunity. Thirdly, on the present application, the Government discards both its previous positions, and

bases its argument upon the ground that Heike's testimony and indictment were not sufficiently connected or "concerned" with each other, within the technical meaning of the statute.

These discrepancies seem to illustrate, better than anything else we have said, the chaotic condition of things and the necessity of a decision by this Court of the law on the subject, for the benefit of the Government's advisers, as well as all other persons interested in the exposure and prosecution of Trusts and Monopolies.

Respectfully submitted,

JOHN B. STANCHFIELD,
Petitioner's Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

CHARLES R. HEIKE, PETITIONER,
v.
THE UNITED STATES.

No. 936.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

STATEMENT.

The petitioner, Charles R. Heike, was convicted upon the sixth count of an indictment which charged him and other persons named with conspiring to commit offenses against the United States by effecting entries of raw sugars into the country at less than their true weights. (R. 1641, 1642.)

Some questions arising out of rulings upon evidence are imported into this case by reference to the *Gerbracht* case, No. 937, but as to these we will follow the example of the petitioner and refer to our brief in that case.

Questions peculiar to this case grow out of the fact that Heike was called as a witness and examined by the grand jury in a proceeding against the American Sugar Refining Company for alleged violations of the antitrust laws of the United States.

On this examination Heike testified to certain facts and produced certain books and documents.

By his testimony and the books and papers produced by him he was identified as being Charles R. Heike, and as being the secretary of the American Sugar Refining Company and its constituent corporations, and the custodian of the books and papers of the different companies. Some signatures were identified as being his, the corporate existence of the American Sugar Refining Company was shown, that it was engaged in the business of refining sugar, and that it imported sugar as the raw material of its business. It was also shown what, during certain periods of time, was the actual weight of the raw or imported sugar used by it. (R. 1643–1645.)

Many of these matters are, on their face, of general notoriety, and such of them as are not were shown by corporate books, records, or reports produced by Heike, and not by any testimony given by him. The statements as to the amount of raw sugar actually used by the company was prepared by other agents of the company, and Heike disclaimed any personal knowledge with respect to it. He might easily have been identified by others as being Charles R. Heike and as being the secretary

of the company, and his signatures existed in abundance, attached to letters sent broadcast over the country and capable of being identified without difficulty.

All these matters were pertinent to the proceeding in the course of which he was examined by the grand jury, which was an inquiry into an alleged violation of the antitrust laws by reason of the acquisition on the part of the American Sugar Refining Company of the Pennsylvania Sugar Refining Company of Philadelphia, arising out of the so-called Kissel loan of December 20, 1903, with which this court is familiar, having dealt with it in *United States* v. *Kissel*, 218 U. S. 601.

No inquiry was made in the course of this proceeding concerning any sugar-weighing frauds.

Heike, however, claims immunity for any participation in or connection with the sugar-weighing frauds, because of his testimony given and the information contained in company records produced by him in the Kissel loan inquiry. (R. 35, 37.) He makes this claim under a proviso of the act of February 25, 19[illegible] Stat. 854, 903, 904, entitled, "An act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes." The pertinent portion of the act is as follows:

> That for the enforcement of the provisions of the Act entitled "An Act to regulate commerce," approved February fourth, eighteen

hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto, and of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, and all Acts amendatory thereof or supplemental thereto, and sections seventy-three, seventy-four, seventy-five and seventy-six of the Act entitled "An Act to reduce taxation, to provide revenue for the Government, and other purposes," approved August twenty-seventh, eighteen hundred and ninety-four, the sum of five hundred thousand dollars, to be immediately available, is hereby appropriated, out of any money in the Treasury not heretofore appropriated, to be expended under the direction of the Attorney General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States: *Provided, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts: Provided further,* That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

Heike filed a special plea in bar, setting forth the fact of his examination by the grand jury and

alleging that in the course of his examination he gave testimony and produced documents concerning the subject-matter of the present indictment, that is, the sugar-weighing frauds described therein, and upon this he predicated a claim of entire immunity for the frauds. (R. 35–42.)

A jury was empaneled for the trial of this plea. The petitioner assumed the affirmative of the issue on this plea and was examined at length on his own behalf. Three witnesses were examined on behalf of the Government, and a number of exhibits were introduced on each side. There was no conflict in the testimony. The court ordered a verdict against the defendant upon this plea and in doing so said, what is not challenged in the record, that:

> Neither side asked that this case be submitted to the jury. There is no dispute as to the facts, and upon the undisputed facts the defendant has wholly failed to establish the allegations of his plea, and there should, therefore, be a verdict ordered to that effect [R. 272].

PROPOSITION AND AUTHORITIES

I.

The plea of immunity presented only a question of law and was properly disposed of by the court.

United States v. *Wilson*, 7 Peters 150;
Bishop Crim. Proc., 3d ed., vol. 1, secs. 817 and 1048;

Hite v. *State*, 9 Yerger 357;
Martha v. *State*, 26 Ala. 72;
Wharton Crim. Plead. & Prac., 9th ed., sec. 484.

II.

Heike gave no testimony before the grand jury in the antitrust proceeding concerning the matter for which he was indicted and tried in the present case.

III.

The immunity statute is one of amnesty.

Brown v. *Walker*, 161 U. S. 591.

IV.

The statute extends only to transactions under the Interstate and Antitrust Laws.

United States v. *Price*, 96 Fed. Rep. 960;
Counselman v. *Hitchcock*, 142 U. S. 547.

V.

As to offenses, generally, against the Criminal Code, the witness is remitted to his constitutional rights.

United States v. *Ford*, 99 U. S., 594.

VI.

The petitioner was properly charged with conspiracy in the sixth count of the indictment.

ARGUMENT.

I.

As to trial by jury of the special plea in bar.

The action of the court in directing a verdict against the defendant on the plea in bar is complained of as depriving the defendant of his constitutional right of trial by jury.

There was in the case confessedly no dispute of fact, and whether defendant was entitled to immunity was purely a question of law. Must the issue, none the less and despite any waiver by the defendant, be submitted to the jury as in the case of a plea of not guilty?

A plea of pardon or amnesty stands upon a different footing from a plea of not guilty. It operates to discharge the defendant, regardless of his guilt or innocence. It may be brought "judicially before the court by plea, motion or otherwise." *United States* v. *Wilson*, 7 Peters 150, l. c. 161. Under the ancient practice it might not be resorted to after the general issue, but it is said by Marshall, C. J., in the case just cited (p. 161):

> Notwithstanding this general assertion, a court would undoubtedly at this day permit a pardon to be used after the general issue.

Under this plea the defendant has the affirmative of the issue and the burden of proof. As said by Bishop in his Criminal Procedure, third edition, volume 1, section 1048:

> No one doubts, that, if the defendant admits his guilt, either absolutely or for the

purpose of the trial, and sets up by plea such matter of defence as a former conviction or a pardon, or if an issue to the jury is tried on his plea in abatement, the burden of proof is with him.

To a special plea in bar the prosecutor may either demur or reply, while the plea of not guilty may not be demurred to and calls for no reply.

Speaking of the plea of former conviction or acquittal, Bishop, in the volume quoted above, says, in section 817, that if the two indictments are such that the offenses can not be the same, the prosecuting officer demurs.

Under a special plea in bar the issue may be one of law or of fact. If the issue is one of fact it should be submitted to the jury, and if one of law it should be decided by the court.

In *Hite* v. *The State*, 9 Yerger (Tenn.), 357, the court said (p. 380):

> In the case now under consideration, a record of a former acquittal is pleaded, which we have determined, charges an offence materially variant from the one upon which the prisoner stands convicted. If a jury had been sworn to try the issue upon *nul tiel* record, the court must have instructed them to find against the prisoner. Why then empannel a jury, when the fact of identity could not have been submitted to them? We are of opinion, there was no legal necessity for it.

And so in *Martha* v. *The State*, 28 Ala. 72, l. c. 75, the court said:

> As the record showed the two indictments to be for different offences, and as a record can not be gainsayed by parol evidence, it was entirely proper for the court to charge the jury that the pleas of *autrefois acquit* and discontinuance were not sustained by the proof. This was no invasion by the court of the province of the jury, for it was the duty of the court to declare the legal effect of the record insisted upon by the prisoner as sustaining her pleas. As a matter of law arising upon the effect of the record, the pleas remained wholly unsustained.

Wharton in his Criminal Pleading and Practice, ninth edition, section 484, thus sums up the matter:

> Wherever the offences charged in the two indictments are capable of being legally identified as the same offence by averments, it is a question of fact for a jury to determine whether the averments be supported and the offences be the same. In such cases the replication ought to conclude to the country. But when the plea of *autrefois acquit* upon its face shows that the offences are legally distinct, and incapable of identification by averments, as they must be in all material points, the replication of *nul tiel record* may conclude with a verification. In the latter case, the court, without the intervention of a jury, may decide the issue.

In the case at bar, when the evidence was all in under the special plea the court dealt with the issue as one of law, and in this, we submit, was right, because (1) Heike did not testify or produce any evidence concerning any transaction, matter, or thing for which he is here indicted, and (2) the immunity granted by the statute extends only to transactions, matters, or things which may be violations of either the Interstate Commerce Act and amendments thereto or of the Antitrust Act and amendments thereto.

If either proposition is tenable, the special plea in bar was insufficient in law, and there was nothing to submit to a jury.

II.

Heike did not testify before the grand jury concerning any matter for which he stands indicted.

Heike, with others, was by the sixth count indicted for conspiring—

> to commit offenses against the United States in and by knowingly making and effecting and aiding in effecting, at less than their true weights, and by means of false and fraudulent written statements as to said weights, entries of certain goods, wares and merchandise, to wit, certain raw sugars, which then and there were subject to duty as aforesaid, and which theretofore, to wit, prior to said *March 1st, 1907*, had been imported and which thereafter were continuously to be

imported into the United States, into the Port and Collection District of New York, through the Collector of said Port and Collection District from foreign countries as aforesaid, by the said American Sugar Refining Company of New York [R. 27, 28].

This count adopted by reference the following averments of the first count (R. 5, 6):

That at all the times hereinafter mentioned the American Sugar Refining Company of New York was a corporation existing under the laws of the State of New York, and was engaged, among other things, in the business of importing into the United States, into the Port and Collection District of New York, through the Collector of said District, from foreign countries, to wit, among others, Cuba and Java, very large quantities of certain goods, wares and merchandise, to wit, raw sugar, which at all said times were subject to duty according to their weight;

That during said period and according to the law of the United States and to the regulations of the Secretary of the Treasury and to the usual routine of the United States Customs Service, the said goods, wares and merchandise imported as aforesaid were weighed by Assistant United States Weighers under the direction of the United States Weighers, for the purpose of obtaining data for the proper liquidation of the duties on said imported goods, wares and merchandise by the Collector of the Port of New York;

That during said periods the amounts of duties on said importations were to be and then and there were liquidated and paid on and according to written statements, to wit: first, United States Weighers' Dock Books, being the official records and reports made by the Assistant United States Weighers when and as in the course of and because of their official duty they weighed the said goods, wares and merchandise, and to wit: second, United States Weighers' Returns, being the official Returns made by the United States Weighers when and as in the course of and because of their official duty they reported and returned the weights of the said goods, wares and merchandise to the Surveyor of the Port of New York and to the Collector of said Port;

That at all said times Charles R. Heike was an officer, agent and employee of the said American Sugar Refining Company of New York, being the Secretary and the Treasurer thereof.

There was much more of the count, but what we have quoted will serve the purposes of this discussion.

To establish the offense against Heike there must be proof of the following facts:

1. That he was the Charles R. Heike named in the indictment.

2. That there was an American Sugar Refining Company.

3. That Heike was its secretary and treasurer.

4. That the company imported raw sugar.

5. That these importations were made at the port of New York.

6. That the sugar as imported was weighed by United States weighers.

7. That duties were payable on these weights.

The sixth and seventh facts might be presumed to exist because of the statutory provisions governing the importation of sugar. The others must be proven by evidence of some kind.

Failing any one of these facts the crime charged in the indictment would not be proven, for it would not exist. Crime, when charged in an indictment, must be identified as an act or transaction, with particulars of time and place and relations of persons and things, which may be said rather to be conditions of the act than elements of the offense.

There is no quality of guilt in any of the facts enumerated above, and nothing in them all which unrelated to something more even tends to prove guilt.

To call Charles R. Heike and ask him in a proceeding in which sugar-weighing frauds are not involved whether he is Charles R. Heike—in other words, simply to identify himself—is not to inquire whether he has been implicated in sugar-weighing frauds.

To ask him whether there is such an institution as the American Sugar Refining Company of New York is not to get any evidence from him that the company has been guilty of the false weighing of sugar.

To inquire of him whether he is secretary and treasurer of the company is no more asking him concerning his participation in such frauds than it is asking concerning a possible embezzlement of the funds of the company.

And so it is with all the other matters concerning which he testified.

He produced a statement of the actual amounts of sugar imported at different periods of time, but it was a statement made by other agents of the company, and he did not know whether it was correct or not, and, in fact, knew nothing whatever about it. It neither proved nor tended to prove anything which had in it any element of guilt.

The guilt in the transaction with which the indictment deals was in those acts which made up the false weighing and the payment of duties on the false weights. Evidence of false weighing tended to prove guilt, and payment of duties on the basis of the false weights completed the proof.

The criminal elements of an act can not, however, be abstracted from the conditions which make up its concrete whole. False weighing of sugar for the purpose of fraud upon the customs must have relation to some sugar imported at some time and place by somebody.

To inquire, as was done by the grand jury in the present instance, concerning the existence of the New York Sugar Refining Company and its ordinary and usual operations as a refiner of sugar, with no thought of or reference to any sugar-weigh-

ing frauds, is not to inquire concerning those frauds.

Everything is in some remote way connected with everything else. We are all related to each other and share with Mark Twain the sorrow he felt at the tomb of Adam, our common ancestor. But the law does not deal with things so remote as being related.

Venue must be shown in a prosecution for burglary. There must be proof that the house entered is situated in the county in which the indictment was found. Testimony given by the burglar—not then known to be such, in a proceeding not concerning the burglary, and, indeed, it not being then known that a burglary had been committed by anybody—that the house was in the county in which the indictment was afterwards found would not be evidence concerning the burglary.

And such is this case. The grand jury was inquiring concerning violations of the Antitrust Act, and had no thought, nor had the defendant, of the weighing frauds. As the trial court said in directing a verdict on the special plea (R. 268, 269, 271):

> * * * The subject-matter of the investigation by that grand jury before which the defendant was summoned was alleged violation of the Sherman Act. No claim was there made that the government was defrauded; the claim there was that the conduct of this sugar company was such that the rights of the people were affected by the re-

straint of trade, and the request of the defendant was that he procure from the books of the company the amount of sugar melted in all of its different refineries, which included, of course, the Havemeyer & Elder Refinery and it bore upon the question as to whether this sugar company as a corporation was reaching out and laying its hands upon other companies in restraint of trade; or, in other words, had it brought into its own grasp the sugar refining business of this country to the detriment of the people? The defendant testified on this trial that no question was put to him or any request made of him whereby his guilt of the charges set forth in this indictment were even thought of by him. If he did not think of it, and how can it be conceived that the attorney for the Government thought of it?

* * * * *

Chief Justice Marshall in the Burr case uses this language: "When two principles come in conflict with each other the court must give them a reasonable construction so as to preserve them both to a reasonable extent. The principle which entitled the United States to the testimony of every citizen and the principle by which every witness is privileged not to accuse himself can neither of them be entirely disregarded."

Applying that principle to the case at bar, the defendant has failed to maintain his plea. Neither he nor the Government attorney, so far as appears here, had the slightest idea that the defendant in his evidence before

the grand jury revealed a single fact that could be made use of in establishing his guilt or any matter or thing to which this indictment relates. The need of vigorous investigation and punishment of offenders of the law is at least as apparent to-day as it ever was, and it is equally apparent that Congress has intended to clothe the Department of Justice with full power to enforce the mandates of the law and to cover the guilty with the mantle of immunity only when essential to ascertain material facts.

Nothing was given in testimony by defendant which had any relation to his guilt or which would point the way to a discovery of his guilt. And of the facts of easy knowledge, if not of public notoriety, such as his own identity, his official relations to the company, the existence of the company, its operations in their lawful phase, and other matters entirely innocent and related to the crime only as a part of the concrete conditions identifying the crime, the evidence given by him was not used on the trial against him, for the original sources of evidence were open to the Government at all times, could not be closed against it, and the evidence itself was always convenient of access and ready for use.

So we submit that the defendant was not immune from prosecution for these frauds, for he had never in any proceeding or at any time testified or produced evidence, documentary or otherwise, concerning them.

III.

The effect of the immunity statute.

We agree with counsel for the petitioner that the statute is one of amnesty. This court so decided in *Brown* v. *Walker*, 161 U. S. 591. We know of no case which so much as suggests another view.

IV.

The scope of the statute.

To what cases does the statute extend? The answer seems to be obvious; it extends to transactions under the Interstate Commerce Act and the Antitrust Act, and only to such transactions.

The terms of the statute show this. The purpose of its enactment as declared by its own words is "the enforcement of the provisions of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto, and of the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, and all Acts amendatory thereof or supplemental thereto, and sections seventy-three, seventy-four, seventy-five and seventy-six of the Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and other purposes,' approved August twenty-seventh, eighteen hundred and ninety-four."

The purpose of the Act, then, is plainly the enforcement of the Interstate Commerce Law and the Antitrust Law.

As one means of aiding in this enforcement the act of 1903 appropriated the sum of $500,000, which was to be expended under the direction of the Attorney General "in the employment of special counsel and agents of the Department of Justice *to conduct proceedings, suits, and prosecutions under said Acts.*"

Manifestly the money thus appropriated could not be applied to prosecutions or proceedings under other acts.

Another means of aiding in the enforcement of these acts was the grant of immunity. "No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, *in any proceeding, suit, or prosecution under said Acts.*"

The grant of money and the grant of immunity were each limited to the support of "proceedings, suits, and prosecutions under said Acts."

The Attorney General may not expend this money, or any part of it, for a purpose not related to the enforcement of these acts even though it is expended in the course of a proceeding which has for its ostensible purpose the enforcement of the acts. In other words, what may be lawfully done in the proceeding must be relevant to the lawful

purpose of the proceeding. And this is true, alike of the money and the immunity.

If an officer of a corporation has embezzled its funds, proof of that crime is not relevant in an inquiry to ascertain whether the corporation is receiving rebates or is engaged in a combination in restraint of trade. And no more is proof of frauds upon the customs. So neither the money nor the immunity may be used in any proceeding which deals with the embezzlement or the frauds upon the customs.

Every "proceeding, suit, and prosecution under said Acts" deals, and deals only, with some "transaction, matter, or thing" which is the proper subject of such a proceeding, suit, or prosecution, and can not deal with anything else. Such a proceeding may deal with rebates, and so may give immunity for rebates; it may deal with restraints of trade, and so may give immunity for restraints of trade. It may not deal with murder, and so may not give immunity for murder. The express exception of perjury committed by the witness in the proceeding itself detracts nothing from the force of the argument, for, as was said in *Glickstein* v. *United States*, 222 U. S. 139, the reservation of the right to prosecute for perjury "was but the manifestation of abundant caution."

Aside from the case at bar the only case in which the question has been passed upon is *United States* v. *Price*, 96 Fed. Rep. 960, and in this the opinion accords with the views here expressed.

The history of the legislation and the purpose of it lead to the same conclusion. But for the Fifth Amendment to the Constitution, which provides that "no person * * * shall be compelled in any criminal case to be a witness against himself," no such legislation would be necessary. Save as limited by this constitutional provision, the power of the Nation to compel the production of testimony is plenary. The Fourth Amendment against unreasonable search and seizure of papers, etc., need not be considered, as that restricts only the mode of exercising the power to secure books and papers when these may be needed as testimony. The warrant for their production or seizure may issue only on probable cause, "supported by oath or affirmation, and particularly describing the place to be searched and the * * * things to be seized."

The Fifth Amendment, as construed by the courts, was confined to cases of actual self-incrimination. If a crime was barred by lapse of time, or if protection against punishment had been granted by an act of amnesty or by an Executive pardon, the privilege against testifying no longer existed.

Cases often arose in which testimony was desired from persons still subject to punishment, and so privileged against testifying, and as an inducement to forego this privilege, or as an equivalent for it, statutes were enacted like section 860, R. S., providing that no evidence given by the witness should be used against him, his property or estate, in any

manner, in any court of the United States, in any criminal proceeding. But it was held in *Counselman v. Hitchcock*, 142 U. S. 547, that the protection of the statute was not as broad as that of the Constitution, as the testimony given by the witness, although not itself used against him, might point or lead to other evidence, which would be so used, and thus, none the less that it was done by indirection, the witness would be compelled to incriminate himself. And so it was held that a statute which compelled the giving of testimony, "to be valid, must afford absolute immunity against future prosecutions for the offense to which the question relates."

From the time of its adoption the Fifth Amendment was, no doubt, often felt to be an impairment of the efficiency of prosecution, but this was never regarded by the courts as a reason for restricting the extent of the protection it afforded.

And, on the other hand, it is to be observed that Congress never resorted to an act of amnesty in order to strengthen the power of the United States to secure testimony in criminal cases until the act of February 11, 1893, c. 83, 27 Stat. 443, and then the act was limited to persons attending and testifying before the Interstate Commerce Commission, "or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress entitled 'An act to regulate commerce,'" etc.

No provision for amnesty has ever been made to aid in getting evidence of crimes such as murder, piracy, perjury, robbery, larceny, embezzlement or fraud. And why? We need not balance one crime against another in the scales of moral turpitude to determine which is the worse, for this may depend upon the particular circumstances of the crime. And Congress was not moved by any such consideration in providing for amnesty only in case of offenses against the Interstate Commerce Act.

Crimes such as murder, piracy, etc., are casual. And always in such a case somebody is involved in the transaction, directly or indirectly, who is interested to complain, to expose, to prosecute, and to see that punishment is inflicted; and only the immediate offender is concerned to obstruct the law. Murder will out. If one man assaults another it is not necessary to bestow amnesty upon the victim to secure his testimony. He needs no amnesty and besides is ready and interested to testify. So of the man who has been robbed or whose money has been embezzled, and, indeed, of the whole list of casual crimes, the exceptions being so rare as not to have invited legislative consideration.

Offenses against the Interstate Commerce Act stood upon a different footing. They were not casual. Constant use of rebates and the like made them a fixed habit of business. And they were attractive rather than repellant. Too many men, victims of discriminations, were content if only they

could come into the favored class. There was therefore a large and growing number of people interested against the law, with a disposition to hold the law, rather than offenses against it, in disrepute.

What was true of the Interstate Commerce Act came to be true of the Antitrust Act. Offenses and offenders under it multiplied, and restraint of trade became the everyday habit of trade. So by the act of February 25, 1903, the immunity was extended to proceedings under the Antitrust Law and by the act of June 30, 1906, 34 Stat. 798, the immunity alike under the Interstate Commerce and the Antitrust Acts was limited to natural persons responding to a subpœna.

Acts of amnesty are usually associated with political offenses. The reasons for amnesty in such cases are obvious. The same act is held by some to be an act of rebellion and by others to be a manifestation of the highest loyalty. It is not a matter for criminal courts. There is no moral turpitude in the individual, and, besides, as Burke noted more than a century ago, it is impossible to indict three millions of people. There can be no trial save by battle, and always it is desired that the old friendship and fraternity which existed before the controversy arose should be restored, and amnesty, complete and unconditional, is the way, and the only way, to reconciliation.

In the case of political offenses prosecutions are at once difficult and undesirable. Rebates and restraints of trade it is desirable to prosecute because

they are not the result of differing views of patriotism and public duty, but are manifestations of greed and do involve individual turpitude. But, like political offenses, they are difficult of prosecution. They are constant and not casual, and they involve many people, so many that prosecution by the ordinary methods of the law is well nigh impossible; for the necessary witnesses being often, indeed, usually, participants in the offense, prosecution is ineffective, and the evil is not abated so long as the law continues a menace to every offender.

So amnesty is granted to whomsoever is called upon to testify, it being necessary to call participants in the transaction. And for what? For the transaction which is being investigated under the acts to aid in the enforcement of which the amnesty is authorized, and in which the witness may have participated.

The terms of the act, its history and the reason of it, concur and compel the conclusion that the grant of amnesty goes only to transactions, matters, or things relevant to a proceeding, suit, or prosecution under the Interstate Commerce or Antitrust Act.

V.

As to offenses other than those against the Interstate Commerce and Antitrust Acts, the witness is remitted to his constitutional rights.

The contention here is, not simply that any testimony the witness may give or produce which tends

to show him guilty of any crime will give him immunity for that crime, but that any testimony which he may give and which tends to prove any fact which must be established to prove the crime as laid in the indictment will give that immunity, even though the fact be in itself without moral quality, a condition of the offense and not an element of guilt.

A crime punishable by law is a concrete thing, and not a mere abstraction. Many, indeed most of the constituents of the concrete thing, have no moral quality, and the mention of them does not suggest crime. A witness testifying to rebates or an act in restraint of trade must testify to matters which are conditions of other acts and transactions of an entirely different nature and yet do not suggest the existence of the other acts and transactions.

We need not go beyond the facts of the present case for an apt illustration.

Heike was called before the grand jury to testify in an inquiry had to ascertain whether the American Sugar Refining Company was engaged in an effort to monopolize the sugar trade. It was necessary to show that there was such a company and what were its regular and usual operations, and also Heike's relations to the company, which were those of secretary and treasurer. He testified and produced documents which proved the existence of the company, its ownership of certain refineries, and that it imported raw sugars, which were subject to duty, and the amount of such importations. All these things were relevant. They showed the

proportion of the sugar trade controlled by the company. And these various facts and others of a like nature shown in evidence were absolutely indifferent so far as concerned moral quality, or if they indicated guilt it was of offense against the Antitrust Law. As to such offense, if any existed, the examination gave immunity to Heike.

But what relation had these facts to sugar-weighing frauds committed in the course of the business of the company? Well, there could be no such frauds if there was no such company, or if the company imported no sugar. The conditions of time and place, too, were common to the transactions under the Antitrust Act and to those under the Customs Act.

There is no suggestion that the grand jury had any information or knowledge of frauds upon the customs, and nothing said and nothing produced by Heike even remotely suggested such frauds.

Heike, himself, on the trial of his special plea in bar, testified that he knew in a general way that a witness would be immune under the Antitrust Act, but "I could not think, however, of an occasion for using it," and "I had done no wrong, and I did not see any reason why I should need it" (R. 163, vol. 1). And further, at page 182, "I did not think of underweighing frauds at all when I handed in these papers, or any frauds of any kind, weighing or otherwise."

He was not compelled to accuse himself. What he said which could in any way relate to weighing

frauds was voluntarily said. But here we have pardon by inadvertence of an offense the existence of which was not suspected by the grand jury.

If the petitioner's construction of the law is the correct one, it makes a most comprehensive grant of the prerogative of pardon in the loosest possible way.

It makes that grant of power to every attorney prosecuting on behalf of the United States under either the Interstate Commerce or the Antitrust Act, to every member of every grand jury inquiring into violations of these acts, and to every district court trying cases under the acts. And more than that, it gives it to the offender himself when called as a witness, for he has but to testify or produce evidence of facts which are mere identifying conditions of other crimes, the commission of which is unknown to the prosecuting attorney, grand jury, or court, to secure immunity for those crimes.

And this comprehensive power may be exercised in bad faith by any one of those with whom it has been lodged and not relevantly to any purpose for which the grant was made.

Beyond this the power may, so to speak, exercise itself, unconsciously and automatically, because of the merest inadvertence of counsel, grand jury, or judge or, as here, the witness himself.

Under such a construction the immunity statute would not be valid. That statute is a part of the Interstate Commerce and Antitrust legislation, en-

acted by Congress in the exercise of its power to regulate commerce among the States, and that power does not go to the extent of granting amnesty or pardon for every crime against a State. As the same act or transaction may include an offense against the State and National laws against trusts, the immunity under National law may, and, to be effective as to that act or transaction, must be good against the State and Nation. But further than this the immunity given by Congress can not go. So far as concerns other offenses, the witness is remitted to his constitutional rights, and must assert them.

Beyond this, it is inconceivable that Congress ever intended that such a grant of power should be so irresponsibly exercised.

As to all other offenses than these against the commercial regulations of Congress, when their punishment is the direct purpose of a proceeding before a grand jury or in court, neither the prosecuting attorney, grand jury, nor court, nor all of them combined, can grant pardon to an accomplice, even though he turn State's evidence and be the means of convicting the other guilty persons. Acting deliberately, consciously, and intelligently, court, grand jury, and attorney can do no more for the purpose of securing evidence to convict of the foulest crime than to give to the witness an equitable right or title to Executive clemency, which we must presume will "be sacredly accorded to him by the President, in whom the pardoning power is

vested by the Federal Constitution." *United States* v. *Ford*, 99 U. S. 594, 606.

And this equitable title to Executive clemency can be given only by the Attorney General as the immediate representative of the President, but even so it is not an absolute right, and no court can give it effect as such.

The constitutional provision against self-incrimination stands unimpaired, and upon that a witness must rely, save in the cases where a better protection, that of absolute immunity for the offense, is provided by the statute. The Constitution and the statute are in no sense in conflict; they stand consistently together, the one designed for criminal cases generally, the other for cases as to which peculiar provisions are required.

But the statute is to be reasonably construed and harmoniously with the general principles of law governing its subject-matter, and so construed it can not be that, as is here claimed, the high prerogative of pardon may be exercised unconsciously when it has not been invoked and the offense to which it is extended is not known to exist.

VI.

The alleged abuse of the conspiracy statute.

Complaint is made that the defendant was indicted for the conspiracy to commit an offense against the United States, and convicted of that, when he was acquitted of the indictment for the

actual commission of the offense. There is no inconsistency in this. The petitioner may well have conspired to commit the offense and yet not have participated in the commission. Certainly there is no legal repugnancy. Counsel say that this present point as presented by them "is, not that the evidence in the case was necessarily insufficient to connect Heike with the sugar frauds, but that, whatever the evidence was, if it were sufficient to connect him as a conspirator, it was sufficient to connect him as a participant, and, *vice versa*, if it were insufficient to connect him with the perpetration of the frauds it was insufficient to connect him with a conspiracy to commit them." It does not follow; but, if it did, the defendant is not aggrieved, because he was convicted upon but one count when he might have well been convicted upon more. The case of *United States* v. *Kissel*, 173 Fed. Rep. 823, cited by petitioner, is not an authority, as it was overruled by this court in 218 U. S. 601.

It is respectfully submitted that the petition should be denied.

F. W. LEHMANN,
Solicitor General.

FEBRUARY, 1912.

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Office Supreme Court, U. S.
FILED.
OCT 15 1912
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 520.

CHARLES R. HEIKE, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

ANSWER TO MOTION TO ADVANCE.

Now comes the above-named Charles R. Heike and objects to the advancement of the argument of the above cause on the grounds: (1) That there are no sufficient reasons for giving said cause a preference on the calendar; (2) that the Government has not shown in the motion papers any extraordinary reason for a preference in the case, and has not stated any *facts* from which it may be reasonably inferred that it will be embarrassed by letting the argument in this case pursue its regular course.

The fact that this is a criminal case is not alone ground for advancement. The interest of other litigants on the calendar must be considered. The rule adopted by this court was thus established:

> Mr. Chief Justice WAITE:
>
> "This is a criminal case. The motion to advance is made on behalf of the United States, upon the representation of the Postmaster-General, in substance, that the questions in dispute will embarrass the operations of the Government while they remain unsettled. * * * Hereafter, motions to advance upon this ground must state the *facts* in such manner that *we may judge* whether the Government will be embarrassed in the administration of its affairs by delay. In the present crowded state of the docket it is our duty to see that cases are not unnecessarily brought forward to the prejudice of others." (italics ours).
>
> U. S. *vs.* Norton, 91 U. S., 558.

In the present case the Government does not even vouchsafe the *opinion* that it will be embarrassed by delay, or that there is any other special reason for advancement. It relies solely on the one fact that this is a criminal case, and utterly omits stating any *facts* from which the court can judge of the exigency of hearing the case. On the other hand, we are unaware of any reason, public or private, for special expedition. Furthermore, before receiving notice of this motion, which was within the past few days, counsel had already

formed plans and made engagements for professional work extending over several months; and if peradventure the court should conclude to advance the argument, we ask that it be set at a late day in the term.

JOHN B. STANCHFIELD,
Of Counsel for Heike, Petitioner.

WASHINGTON, *October* 14, 1912.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

CHARLES R. HEIKE, PETITIONER,
v.
THE UNITED STATES. } No. 520.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ADVANCE.

In accordance with Rule 26, Section 3, this being a criminal case, the Solicitor General moves the court to advance it on the docket and set it down for hearing on a date convenient to the court during the October Term, 1912.

The petition for writ of certiorari was granted on February 19, 1912, to review a judgment of the Circuit Court of Appeals for the Second Circuit affirming a judgment rendered on September 19, 1910.

The final judgment was to a term of eight months' imprisonment and a fine of five thousand dollars ($5,000) for conspiracy with other agents and employees of the American Sugar Refining Company

of New York to procure the entry of imported sugars at less than their true weights and by means of false and fraudulent statements as to said weights.

Since sentence the petitioner has been at large on bail.

Notice of this motion has been served on opposing counsel.

WM. MARSHALL BULLITT,
Solicitor General.

OCTOBER 15, 1912.

Office Supreme Court, U. S.
FILED.
DEC 2 1912
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 520.

CHARLES R. HEIKE, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES OPPOSING THE MOTION TO ADJOURN THE HEARING OF THIS CASE.

On September 19, 1910, Heike was sentenced to eight months' imprisonment and to pay a fine of $5,000, which judgment was affirmed by the Circuit Court of Appeals on October 10, 1911.

Heike applied to this court for a writ of *certiorari* upon the grounds that—

First. "It is of the *greatest interest*, not only to the petitioner individually, but *to the public at large*, that an *immediate* and conclusive decision be given upon the important question in this case."

Second. "It is of the *highest public importance and interest* that this court should supply a complete interpretation of the meaning of the word 'concerning' in the immunity statute."

Third. "It is of the *highest public interest* that this court should establish the public policy governing the immunity statutes."

Fourth. "It is of the *utmost public importance and interest* that this court should determine whether a defendant * * * is deprived of his constitutional right to trial by jury by the action of the court in instructing the jury," etc.

Fifth. "It is of the *utmost public importance and interest* that this court *put a stop* to an abuse of the conspiracy statute, R. S., 5440." (See petition and brief for writ of certiorari filed by Charles R. Heike Jan. 24, 1912, pp. 29, 59, 73, 98, 103, 104.)

Upon that showing this court granted the writ of *certiorari*.

On October 15, 1912, the United States moved to advance the case for hearing. Heike opposed the motion upon the ground that his "counsel had already formed plans and made engagements for professional work extending over several months."

This court nevertheless advanced the case and set it for hearing on January 6, 1913, giving practically three months' time for preparation. Now, at almost the last moment Heike moves to adjourn the hearing upon the same ground, to wit, that his counsel is engaged on other professional work and the added ground that he (Heike) is ill.

There is certainly no ground for adjourning the hearing.

Heike secured the writ of *certiorari* upon the plea of the *controlling public importance and interest* in an "*immediate*" decision by this court of the questions raised in his case. The same controlling public importance and interest which authorized the granting of the writ of *certiorari* now likewise demand an early decision of those questions.

Heike's counsel has had nearly a year in which to prepare his brief since the writ of *certiorari* was granted and nearly three months since the case was advanced.

The Government insists that, as Heike is now out on bail, the public interest demands that the case be heard on January 6 and finally disposed of, both as to his own conviction and as to the important legal questions therein involved.

As the questions involved are largely questions of constitutional law, Heike's illness can have no effect upon his counsel's consideration of those questions.

WM. MARSHALL BULLITT,
Solicitor General.

NOVEMBER 30, 1912.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1912

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1912.

No. 520.

CHARLES R. HEIKE,
Petitioner,

against

THE UNITED STATES OF AMERICA.

Notice of Motion.

2

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT.

Sir:

PLEASE TAKE NOTICE, that Charles R. Heike, the petitioner above named, will, on Monday, the 2nd of December, 1912, upon his written motion, containing a brief statement of the facts and objects of said motion, signed by John B. Stanchfield, his counsel herein, on the 27th day of November, 1912, and the affidavit of Louis Fangeres Bishop, M. D., dated the 27th of November, 1912, and upon a copy of the record and all the papers and files herein, at the opening of court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which and of the accompanying affidavits is herewith delivered to you, to the Supreme

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Court of the United States, in its Court Room at the Capitol in the City of Washington, D. C.

Dated, New York, November 27, 1912.

Yours, etc.,
JOHN B. STANCHFIELD,
Counsel for Petitioner,
11 Pine Street,
Boro. of Manhattan,
New York City.

To
WILLIAM MARSHALL BULLITT, Esq.,
Solicitor General.

The foregoing notice is hereby accepted, and service of a copy thereof and of the motion papers therein mentioned, is hereby acknowledged this 28th day of November, 1912.

WM. MARSHALL BULLITT,
Solicitor General of the United States.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1912.

No. 520.

CHARLES R. HEIKE,
Petitioner,

against

THE UNITED STATES OF AMERICA.

Motion.

Motion to Adjourn Hearing of Motion.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT.

Now comes CHARLES R. HEIKE, by John B. Stanchfield, Esq., his counsel, and moves this Honorable Court to adjourn the argument herein, which was duly advanced on the docket by order of this Court dated October 21, 1912, and set down for hearing for January 6, 1913, to a subsequent day certain, to suit the convenience of the Court, but not earlier than March 1, 1913, on the following grounds:

The petitioner, Charles R. Heike, has been dangerously ill and confined to his bed for more than a month, with positive instructions from his physician, as counsel is informed, that he cannot attend to any kind of business or consult with counsel without risk to his health. The nature of the case is such as to require several interviews